U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: Aug. 13, 1998

Case No.: 98-INA-31

In the Matter of:

UGLY DUCKLING RENT-A-CAR,
Employer,

on behalf of

ELIASER P. ESPINOZA,
Alien.

Appearance: K. Sean Singh
for the Alien

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for alien labor certification[1] by an auto rental, service and sales company for the position of service manager (AF 13).[2] The Certifying Officer (CO) denied certification on the grounds that a qualified U.S. worker was rejected for the position because of a job requirement not listed on the ETA 750A form (AF 10).

STATEMENT OF CASE

In the Notice of Findings (NOF), the CO stated, *inter alia*, that Employer improperly rejected an United States applicant for the position (AF 10). The basis for Employer's rejection of this applicant, James MacKert, was that he did not meet the necessary job qualifications. In the Results of Recruitment, Employer stated that applicant MacKert was "well qualified, but did not have own set of tools. Therefore he was rejected." (AF 24). On the ETA 750A form, possession of tools was not listed as a job requirement. The CO requested that it be shown that the US worker was not qualified for the job based on a requirement that was listed on the ETA 750A

[1]Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2]"AF" is an abbreviation for "Appeal File."

form.

In Employer's Response to the NOF, Employer failed to directly address the CO's assertion that Mr. MacKert was rejected on the basis of an unstated job qualification (AF 8). Accordingly, in the Final Determination, the CO denied labor certification for failing to satisfactorily rebut the NOF. The CO stated that Employer failed to take the requested Corrective Action, by failing to "show that the U.S. worker who applied is not qualified based on their [sic] failure to possess the requirements set forth on the ETA 750 Part A" (AF 6).

Employer's attorney filed a Request for Reconsideration after the denial and submitted a statement by an employee in his office to explain a mistake that had been made in the preparation of the Results of Recruitment that had not been noticed until after the Final Determination had been issued. Employer alleges that this mistake shows that the U.S. applicant MacKert was denied for lawful job-related reasons (AF 4). The CO denied the motion for Reconsideration and in her denial made no reference to the evidence submitted by Employer after the Final Determination (AF 1).

DISCUSSION

The burden of production and persuasion regarding an alien labor certification rests on the employer. *See* ***Cathay Carpets***, 87 INA 161 (Dec. 7, 1988). Employer failed to fully explain lawful job-related reasons for not hiring applicant MacKert in its Rebuttal to the NOF. The evidence that Employer submitted after the Final Determination, does not remedy this failure. This new evidence was not submitted within the 35-day deadline for submission that begins to toll after the issuance of the NOF as set forth by 20 C.F.R. 656.25(c)(3). This 35-day deadline must be narrowly construed in order to assure clarity and consistency in the administration of the rebuttal and appeal processes. *See* ***Park Woodworking, Inc.***, 90-INA-93 (Jan. 29, 1992) (*en banc*). In cases applying the Park Woodworking rule, the Board has held that "mere inadvertence, oversight, or negligence, whether the fault of an employer's counsel or a pro se employer itself, is insufficient to warrant an exception requiring extraordinary relief." *See* ***Magic Windows Inc.,*** 92-INA-250 (Feb. 3, 1994).

In the case at bench, Employer should have fully explained its reasons for not hiring applicant MacKert and submitted all evidence to support its reasons before the Final Determination was issued. Employer's counsel's failure to recognize its own mistake in preparing the Results of Recruitment until after the Final Determination amounts to mere oversight and is not a "rare instance which would require extraordinary relief in order to avoid manifest injustice." *See id.*

Employer asserts that evidence attached to a timely filed reconsideration request should be

considered on the appeal of this case.[3] The CO did not address the new evidence in her Denial of Employer's Request for Reconsideration. Therefore, this evidence is not part of the official record and cannot be relied upon in appellate proceedings. The Board has held that, "the mere attachment of new evidence to a Motion for Reconsideration does not automatically place that new evidence 'within the record' for appellate consideration within the meaning of [20 C.F.R.] Section 656.26." *See* ***Magic Windows Inc.,*** 92-INA-250 (Feb. 3, 1994). As an appellate body, the Board's decisions "must be based only on the record on which the CO reached her decision, and on arguments submitted in any brief or statement of position by the parties." *See* ***Belgrove Major Appliance***, 93-INA-237 (Jul. 18, 1994); *see also* §656.27 (c).

Employer failed to sufficiently rebut the CO's NOF by not giving lawful job-related reasons for rejecting applicant MacKert until after the Final Determination. This Board has consistently and repeatedly held that a finding in the NOF not rebutted in the employer's rebuttal is deemed to have been admitted, and that an employer's failure to address a deficiency called out in the NOF justifies a denial of certification. *See* ***Belgrove Major Appliance***, 93-INA-237 (Jul. 18, 1994); *see also* ***Belha Corporation (Four Corners Importers)***, 88-INA-24 (May 5, 1989) (*en banc*); ***Salvation Army***, 90-INA-43 (Dec.17, 1991); **Reliable Mortgage Consultants**, 92-INA-321 (Aug. 4, 1993); **Tarna of California**, 88-INA-71 (May 9, 1988). Prior to the issuance of the Final Determination, Employer did not directly address the CO's allegation that a U.S. worker was denied on the basis of an unstated job qualification. Therefore, the CO properly denied alien labor certification.

ORDER

The CO's denial of alien labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

[3] This new evidence is entitled "Declaration of Marilyn Cadenas." Ms. Cadenas is the case manager in charge of immigration files in Employer's attorney's office. Her declaration asserts that her misunderstanding of Employer's reason for rejection of applicant MacKert contributed to the denial of labor certification (AF 4).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.